

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the
Invasive Species/Infested Waters Civil
Citation No. CV 178022 Issued to
David J. Hollenkamp

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came before Administrative Law Judge Steve M. Mihalchick for a prehearing telephone conference call on September 19, 2013, pursuant to a Notice of Prehearing Conference and Notice of Hearing that was issued on September 9, 2013. Conservation Officer Keith Bertram (CO Bertram) appeared on behalf of the Department of Natural Resources (DNR) without counsel. David J. Hollenkamp (Appellant) appeared on his own behalf without counsel.

On September 19, 2013, the parties agreed to treat the telephone conference as the formal hearing on the citation. Sworn testimony was taken and argument was presented during the hearing. The record closed that day upon adjournment of the hearing.

STATEMENT OF THE ISSUES

1. Whether Appellant violated Minn. Stat. § 84D.10, subd. 4(b), by failing to have a drain plug removed or open when transporting water-related equipment.
2. Whether \$100 is the appropriate civil penalty for the violation under and Minn. Stat. § 84D.13, subd. 5(a)(6).

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Appellant committed a violation of Minn. Stat. § 84D.10, subd. 4(b), and that a civil penalty of \$100 is not unreasonable. Therefore, the Administrative Law Judge recommends that the Commissioner affirm the citation and fine.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Appellant lives in Isanti County, Minnesota, northeast of Princeton. He has fished his whole life and often fishes at Green Lake, which is also in Isanti County about five miles straight south of his home. Appellant is aware of the dangers of aquatic invasive species to Minnesota lakes and takes great care to remove them from his boat after fishing. When leaving a lake, his routine is to pull the bilge drain plug and drain the boat. He does not have a live well. He then takes the boat and trailer home and cleans and bleaches them. He even cleans and bleaches the anchor rope. When they are clean and dry, he replaces the drain plug and stores the boat and trailer in his garage. When he goes fishing again, he leaves the drain plug in and drives to the lake.¹

2. The morning of July 26, 2013, Appellant took his boat out of the garage, left the drain plug in place, and drove to Green Lake. CO Bertram and another Conservation Officer were at the Green Lake access watching for violations of laws related to transporting aquatic invasive species when Appellant pulled in. CO Bertram observed that Appellant's bilge drain plug was in place, in violation of Minn. Stat. § 84D.10, subd. 4(b). He had a discussion with Appellant about that. CO Bertram pulled the drain plug. The boat was dry and no water came out. CO Bertram observed that Appellant had a very clean boat.²

3. Based upon his observations, CO Bertram issued Civil Citation No. 178022 to Appellant for a violation described as "Fail to Remove Plug." The penalty imposed was \$100.³

4. Appellant was aware of the requirement of Minn. Stat. § 84D.10, subd. 4(a), to remove the drain plug before transporting the boat off the access site. He was not aware of the requirement of subdivision 4(b) to have the drain plug removed whenever transporting a boat. He had never noticed any reference to that part of the law on water access site signs.⁴

5. Appellant is sure that he is not spreading invasive species. He suggests that the signs at access sites should be clear about the requirement to have the drain plug in whenever transporting a boat.⁵ CO Bertram testified that the DNR makes an effort to inform the public, but boat operators are required to know the law.⁶

6. Appellant timely appealed the citation in a letter to the Commissioner of the DNR.⁷

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

¹ Testimony (Test.) of David Hollenkamp.

² Test. of Keith Bertram and D. Hollenkamp.

³ Citation No. CV 178022; Test. of K. Bertram.

⁴ Test. of D. Hollenkamp.

⁵ Test. of D. Hollenkamp.

⁶ Test. of K. Bertram.

⁷ DNR request for assignment of an Administrative Law Judge.

CONCLUSIONS OF LAW

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50; 84D.13, subd. 8; and 116.072, subd. 6.

2. The statute regarding removal of drain plugs in boats and other types of water-related equipment is Minn. Stat. § 84D.10, subd. 4. It states, in relevant part:

Subd. 4. Persons transporting water-related equipment.

(a) When leaving waters of the state a person must drain water-related equipment holding water and live wells and bilges by removing the drain plug before transporting the water-related equipment off the water access site or riparian property.

(b) Drain plugs, bailers, valves, or other devices used to control the draining of water from ballast tanks, bilges, and live wells must be removed or opened while transporting water-related equipment.

Thus, subdivision 4(a) of the statute requires drain plugs to be removed before transporting a boat off the water access and subdivision 4(b) requires them to be removed whenever transporting a boat.

3. Conservation Officers are authorized to issue civil citations to persons who violate Minn. Stat. § 84D.10, subd. 4(b).⁸ If a civil citation is issued, the statutorily prescribed fine for a violation of Minn. Stat. § 84D.10, subd. 4(b) is \$100.⁹ Therefore, the civil citation and penalty that CO Bertram issued to Appellant was authorized by law.

4. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be brought under the procedures set forth in Minn. Stat. § 116.072, subd. 6, provided that a hearing is requested within 15 days after receipt of the citation.

5. Appellant filed a timely appeal and request for hearing.

6. At a hearing on a violation of Minn. Stat. ch. 84D, the burden is on the DNR to show by a preponderance of the evidence that the appellant violated the statute cited.¹⁰

7. Appellant violated Minn. Stat. § 84D.10, subd. 4(b), by transporting a boat without opening or removing its drain plug.

8. Pursuant to Minn. Stat. § 116.072, subd. 6(c), the Administrative Law Judge may not recommend a change in the amount of the proposed penalty unless the

⁸ Minn. Stat. § 84.13, subd. 4 (2012).

⁹ Minn. Stat. § 84D.13, subd. 5(a)(6) (2012).

¹⁰ Minn. R. 1400.7300, subp. 5 (2012).

judge determines that, based upon the factors in subdivision 2,¹¹ the amount of the penalty is unreasonable.

9. The penalty amount of \$100 is not unreasonable.

10. For purposes of Minn. Stat. § 116.072, subd. 6(d), Appellant's request for hearing was not solely for purposes of delay and was not frivolous.

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. 178022 issued to Appellant be **AFFIRMED**.

Dated: October 15, 2013

s/Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five days after receipt of the Report of the Administrative Law Judge. The persons to whom the order is issued may, within those five days, comment to the Commissioner, and the Commissioner will consider the comments. The final order of the Commissioner may be appealed pursuant to Minn. Stat. §§ 14.63 and 14.69.

MEMORANDUM

In an appeal of a DNR civil citation, the burden of proof is on the Department to prove by a preponderance of the evidence that a violation of law occurred.¹² A preponderance of the evidence means that it must be established by a greater weight of the evidence.¹³ "It must be of a greater or more convincing effect and ... lead you to

¹¹ Minn. Stat. § 116.072, subd. 2 (2012), provides that, in determining the amount of penalty, the commissioner may consider: (1) the willfulness of the violation; (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state; (3) the history of past violations; (4) the number of violations; (5) the economic benefit gained by the person by allowing or committing the violation; and (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

¹² Minn. R. 1400.7300, subp. 5.

¹³ 4 Minnesota Practice, CIV JIG 14.15 (2012).

believe that it is more likely that the claim...is true than...not true.”¹⁴ The preponderance of the evidence standard is less than the clear and convincing standard, and less than the proof beyond a reasonable doubt standard used in criminal trials.¹⁵

Here, a preponderance of the evidence establishes that Appellant transported his boat to the Green Lake access while its bilge plug was inserted. He was observed doing so by CO Bertram. Appellant admits that he did so. Therefore, the DNR has met its burden of proving that Appellant violated Minn. Stat. § 84D.10, subd. 4(b).

It is clear that Appellant made every effort to comply with the laws related to aquatic invasive species and goes out of his way to be sure that he does not spread them. Unfortunately, he was not aware of that part of the law that states that the drain plug must be out whenever and wherever a boat is being transported. As part of its public education effort, the DNR may wish to review its access site signage to be sure that it clearly informs the public on this issue.

While a \$100 fine is significant, it is the amount specified by Minn. Stat. § 84D, subd. 5(a)(6), and is reasonable in relation to the harm that the DNR seeks to prevent. The civil citation and fine should be affirmed.

S. M. M.

¹⁴ *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

¹⁵ *State v. Shamp*, 422 N.W.2d 520, 525 (Minn. Ct. App. 1988), *citing Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1988), *review denied* (Minn. June 10, 1988).